IN THE

Supreme Court of the United States

October Term, 1952

No. 87

UNITED STATES OF AMERICA,
Petitioner,

v.

EDWARD A. RUMELY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinions in the Circuit Court of Appeals reversing the order and judgment of the District Court and remanding the case to the District Court with instructions to dismiss the indictment are printed in full beginning on Page 193 of the Record. They are also reported in 197 F. 2d 166.

JURISDICTION

The decision of the Court of Appeals was rendered on April 29, 1952 (R. 224). The petition for a writ of certiorari was filed on May 28, 1952. The petition for a writ of certiorari to the United States Court of Appeals

for the District of Columbia was granted on October 13, 1952. (R. 227). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

This case presents a review of the decision of the Circuit Court of Appeals of the District of Columbia reversing the judgment of conviction of the respondent in the District Court on an indictment based upon alleged violations of R.S. 102, as amended, 52 Stat. 942, 2 U.S.C. 192, which provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, * * * or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000, nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

RESTATEMENT OF QUESTIONS PRESENTED

1. The first question is whether, under the guise of investigating "lobbying activities", Congress had power, or attempted, to authorize an inquiry and to compel testimony regarding private efforts to influence public opinion regarding federal legislation through the general sale and distribution of books and pamphlets.

2. The second question is whether a Committee of Congress, established for the purpose of investigating "lobbying activities", had constitutional authority (in the absence of any pretense that a "clear and present public danger" existed) to require a publisher, by subpoena or

interrogatories, to disclose the names and addresses of purchasers of books published and distributed by him, particularly when the publisher had made available to the Committee all his financial records except the names and addresses of such purchasers.

3. The third question is whether in this criminal action for contempt of Congress there was any evidence sufficient to support a ruling as a matter of law that the names and addresses of purchasers of books published by respondent's employer (in quantities costing over $500.00) were pertinent to the Committee's inquiry into "lobbying activities".

COUNTER STATEMENT OF THE CASE

The statement and argument of this case by the Solicitor General ranges so far afield from the issues, the evidence and the judicial rulings in the case actually before this Court, that a counter statement is necessary as the basis for any clear and sound argument.

The respondent, Edward A. Rumely, was convicted of contempt of a House Committee *solely* because of his refusal to furnish the Committee (by records or oral testimony) with the names and addresses of the purchasers of books published by the Committee for Constitutional Government, Inc., of which he was the Executive Secretary. He did *not* refuse to produce any of the "financial records" of the Committee for Constitutional Government, Inc. (hereafter described as "C.C.G.")

We quote from the opinion of the Court of Appeals as follows:

> "But, as the case comes to us, *there was no refusal to produce financial records.*[1] Over and over again

[1] Italics throughout this brief are ours, unless otherwise indicated.

> Rumely asserted before the Committee that he had given and was willing to give, all records except the names and addresses of the purchasers of the books. No contention was made at those hearings that he refused to give anything else. Upon the trial the prosecutor did not say that anything else was refused. On the contrary, he urged a different view. He insisted, and the Court sustained the view, that, so long as the names of purchasers of books were not given, financial records of contributions and loans were immaterial to the issues in the case." (R. 199, 200)

The Government contended *in the Trial Court* that the House Committee had a right to demand testimony as to the names and addresses of purchasers of books because that Committee was authorized to investigate, and was investigating, "lobbying activities", and that the "lobbying activities" of the C.C.G. were proved conclusively by the fact that the C.C.G. and Rumely had registered under the Lobbying Act as lobbyists. Therefore, it was contended that the testimony sought from Rumely was "pertinent" to the Committee inquiry into "lobbying activities".

The testimony of Rumely showed, and it was conceded, that he had registered himself and his organization as "lobbyists" *only under protest.* He repeatedly asserted: "I am not employed for the purpose of supporting or opposing legislation". (R. 182, 186, 187).

A curious feature of this case is that the Government successfully *opposed* any testimony or documentary evidence to show what the activities of the C.C.G. actually were; and the trial judge held and instructed the jury that "the nature of the activities of the defendant or of the organization with which he was connected is not the issue in this case". (R. 176) The Government contended in the Trial Court that the pertinency of the information sought from Rumely was established sufficiently and completely when it was shown that he had registered as a lobbyist.

Now, the Government contends in *this* Court that purchases of books were used as a subterfuge for making contributions to the C.C.G. in aid of lobbying. If this contention had been made in the Trial Court, it would have been plain that testimony, *which Rumely offered* regarding the activities of the C.C.G., must be admitted. Also, it would have been plain that the financial records of the C.C.G. were relevant and material. As the Court of Appeals held:

> "Certainly if the pertinency of the question rested even in part upon the Committee's desire to probe into possible subterfuges, the financial records would have been relevant and material. The prosecutor urged and the Court held that the financial data was inadmissible." (R. 200)

So, we *now* have the strange contention made in this Court by the Government that the conviction of Rumely should be upheld because he and the C.C.G. were engaged in "lobbying activities", although he denied this and the Government successfully opposed any testimony as to what the activities of the C.C.G. were! We also face the contention that the financial transactions of the C.C.G. were a subterfuge to cover lobbying, although the Government successfully opposed any testimony regarding the financial records of the C.C.G.!

In a word, the Government is seeking *now* to sustain a conviction on the basis of alleged evidence that was not presented and presentation of which the Government successfully *opposed* in the Trial Court,—on the basis of imaginary and distorted evidence, the frailty and falsity of which the defendant was denied the opportunity to expose in the Trial Court. The Government is here seeking to take advantage of the novel theory of sustaining the conviction which was devised by the dissenting judge in the Court of Appeals, as to whose opinion the majority made the following appropriate comment:

"We think our dissenting judge discusses a case which is not before us—issues not presented in the Trial Court, and facts not in evidence in this record." (R. 209)

Before we proceed with a statement and argument of the case which actually is before this Court, we feel it necessary to demonstrate completely the unfairness of the statement and argument of the Solicitor General in the present case. We can assume that this Court will not be concerned with the extensive irrelevant discussion in the Government brief of the evils of lobbying and the propriety of investigations intended, at least ostensibly, to provide the basis for legislation against lobbying. But the Court may find it difficult to focus its attention on the very important major issue here presented which is: Can a Committee of Congress use its investigatory power to hamper, embarass and thus "abridge" the constitutionally protected freedom of the press?

If we had here the simple question as to whether a well known, long-established publisher of books, magazines or newspapers could be haled before a Committee of Congress and compelled to testify as to the names and addresses of all the purchasers of his books or magazines or newspapers, we could expect confidently that there would be an emphatic denial by this Court of the existence of any power in the Congress to compel such testimony and thus abridge the freedom of the press. Hence, if the evidence before this Court in the present case *clearly* showed that the C.C.G. was *simply* a publisher of books and articles partly sold and partly distributed free to the general public, it would become immediately evident to this Court, as it did to a majority of the Court of Appeals, that a conviction of Rumely for contempt in refusing to reveal the names of purchasers of their publications could not be sustained.

What makes possible a confusion and misunderstanding of the present case is *not* any failure of Rumely to

testify as to the activities of his organization, but the refusal of the Government prosecutor and of the Trial Court to permit him to give such testimony. There was sufficient testimony given before the House Committee so that in its report citing Rumely for contempt the Committee itself stated flatly:

> "The distribution of printed material to influence legislation indirectly *by influencing public opinion* is the basic function of the Committee for Constitutional Government." (H. Rep. 3024, 81st Cong. 2d Sess. p. 2)

(It is a curious example of the lack of candor in the Government Brief that, in quoting the foregoing sentence (petitioner's brief, Page 6), the Solicitor General *left out* the important words, "by influencing public opinion".)

In the hearings before the House Committee the respondent, Rumely, repeatedly sought to make it clear that the C.C.G. was not engaged in any "lobbying activities" as such activities are commonly defined. This point was brought out clearly in the opinion of the Court of Appeals. (R. 203, 204) It is obvious that many of the publications of the C.C.G., regarding political subjects or subjects of legislation would be transmitted to, or called to the attention of, members of Congress. But no one would contend that a publishing house was engaged in lobbying because the purchasers of its publications or the publisher himself sent copies to members of Congress.

The only feature of the activities of the C.C.G. which distinguished them from those of an ordinary publishing house was the fact that the C.C.G. distributed a great many publications free and sold a great many at less than cost with the avowed purpose of influencing public opinion in favor of the policies or programs advocated. (R. 90) In the Trial Court counsel for the defendant Rumely offered in evidence Judge Norton's handbook on "The Constitution" and other books "to show the character of the publications sold by this Committee", (the

C.C.G.) (R. 99) Also an engrossed copy of the Bill of Rights disseminated in numbers totaling millions and "types of all books and literature published and disseminated by this Committee for Constitutional Government". (R. 90, 99, 100, 102). Not only had these books been sold but also given away in enormous quantities.

Obviously, a publishing house which gave away great quantities of publications and which sold others at less than cost would find it necessary to raise money from the contributions, in addition to revenues received from the sale of books. (Again we point out that all the financial records of the C.C.G. were made available to the House Committee.) Naturally many of these publications would be sent directly or indirectly to members of Congress. Hence, when the Lobbying Act was passed, which defined as a lobbyist anyone who solicited or received money to be used "to influence directly or indirectly the passage or defeat of any legislation by the Congress of the U.S.A." —a serious question arose as to whether the C.C.G. and its Executive Secretary were required by the law to register. In view of the severe penalties attached to any failure to register, the only discreet action for the C.C.G. and Rumely was to register under protest as a lobbyist. (See, "Penalties and Prohibitions," Sec. 310 of Lobbying Act) P. L. 601, 79th Congress, USC Title 2

This protest was obviously based on two propositions. First, that C.C.G. and Rumely were not engaged in lobbying under the terms of the law, and second, if the work they were engaged in were defined by the Act as "lobbying", the Act would be an unconstitutional abridgement of the rights of free speech and free press.

At this point it is appropriate and necessary to point out that the constitutionality of the Lobbying Act was challenged in the case entitled *National Association of Manufacturers of U.S.A. et al. v. J. Howard McGrath*

and a special statutory court in the District of Columbia held these provisions of the Act to be unconstitutional. (103 F. Supp. 510) Unfortunately, when this case reached this Court at this term, it was dismissed as moot on a technical ground and hence has not been reviewed by this Court. (No. 174 October 13, 1952, Rehearing denied November 18, 1952) But, we submit that the unanimous opinion of the statutory court is a sound opinion well grounded on many decisions of this Court and we must assume, until this Court holds otherwise, that the Lobbying Act is unconstitutional. This has a strong bearing upon the present case because it makes it clear that no evidence that the C.C.G. and Rumely were engaged in "lobbying activities" can be based on the fact that they registered *under protest* under that Act.

Yet, the *sole basis* for the contention of the Government, sustained in the Trial Court, for holding that Rumely was engaged in "lobbying activities" and that, therefore, the questions asked of him were pertinent, was the evidence presented by the prosecutor showing the registration *under protest*. Let there be no mistake as to the record in this regard. The prosecutor in the Trial Court stated:

> "We think the evidence as to the pertinency to the resolution and therefore as to the inquiry of this Committee is *fully covered* when we have proved, as we have here, that there was registration by the organization of which Mr. Rumely was the Executive Secretary". (R. 40).

He further stated:

> "We think; in view of the fact that he was registered and his organization was registered, even though, as he stated under protest, that it shows some, if not all of the activities of the Committee for Constitutional Government came within the purview of an inquiry by this Committee." (R. 40)

It must be remembered that there was no further evidence offered in behalf of the Government to prove that the C.C.G. and Rumely were engaged in "lobbying activities", except the evidence that they published books and pamphlets discussing matters that had been or might be subjects of legislation. Accordingly, there is *no basis* for the contention of the prosecution that the questions asked of Dr. Rumely were pertinent to an inquiry into "lobbying activities", *except* the evidence that they had registered *under protest* under a law whose definition of "lobbying activities" might have been held to cover any publication of books on political subjects—a law which has been held unconstitutional because of the vagueness and invalidity of any such definition of "lobbying activities".

The only real issue presented on appeal from the Rumely conviction was whether a publisher of books could be compelled to reveal the names and addresses of purchasers of his books, or whether such an attempt by a Committee of Congress was an unconstitutional abridgement of the freedom of the press. To state the issue is practically to answer it. But in view of the extraordinary scope of power which the government seeks to sustain in a Congressional Committee, despite the flat denial of such a power in the Constitution, we must proceed patiently to argue this issue. However, before so doing, brief attention should be given to the false issue raised by the Government's Petition and Brief. That is the pretense that what the House Committee was here seeking was to investigate a "subterfuge" whereby, under cover of purchases of books, contributions were made to lobbying—contributions to an organization which was engaged in lobbying.

In addition to the discussion of this false issue, and the dominating real issue in this case, we shall find it necessary to consider with reasonable brevity the manifold

errors of the Trial Court in its rulings on evidence and instructions to the jury. If, as is plain from the opinion of the Court of Appeals, the Trial Court should have granted the motion for a judgment of acquittal which was made at the conclusion of the Government's evidence, or granted the motion when renewed at the close of all the evidence, then the other errors of the Court, in denying the defendant his right to present relevant evidence and in other improper rulings, need not be considered. These errors were not passed upon by the Court of Appeals because the Court found it unnecessary to consider them. We assume that this Court will be of the same opinion, but it would be unfair to the respondent, and perhaps presumptuous on our part, to assume a favorable ruling upon the major issue in this case, especially in view of the fact that this Court has granted certiorari. So it will be necessary before we conclude this brief to review the substantial errors of the trial judge in his rulings on evidence and in instructions to the jury—rulings which denied to the defendant rights so substantial and universally upheld that no conviction resulting from such errors could possibly be sustained.

SUMMARY OF ARGUMENT

1. *The False Issue*

The government is seeking to have reviewed here a case which was not tried but which on the contrary, the government refused to have tried in the trial court. The Solicitor General concedes that the transcriptions of the Hearings before the House Committee and the Committee Report were not admitted as evidence, nor made a part of the record in this case, but urges that this court should take judicial notice of them as did the dissenting judge in the Court of Appeals.

Due process of law requires that if judicial notice is taken of testimony at a Congressional Hearing or in-

cluded in a Congressional committee Report, then t party on trial must have an opportunity to refute

In this case, the trial court did not consider the Rep or Hearing now sought to be judicially noticed. Th were not introduced into the record in any manner (cept for fragmentary extracts from the Hearings); a the trial court, at the insistence of the prosecution, fused respondent's proffer of evidence which would ha refuted the conclusions now sought to be drawn fr these extraneous documents. The lawfulness of the co viction of the respondent in this criminal case must determined by the formal record, made up and tra mitted as required by law.

2. *The Major Real Issues*

a. The Buchanan Committee was only authorized investigate "lobbying activities" intended to influence courage, promote or retard legislation. This authorizati did not extend to efforts to influence public opinion wh might "indirectly" influence legislation. (H.R. Res. 2 81st Cong.)

b. The public sale of books and documents intend to influence public opinion is not a form of "lobbyin subject to Congressional regulation; and the attempt compel the furnishing of the names of the purchasers such books and documents was a clear violation of fr dom of the press and of the Constitutional rights of t respondent.

c. The argument of the government is based upon t apparent assumption that the language and doctrines the Bill of Rights are so old fashioned as to hamper u duly the desire of an "up-to-date" legislator to terror and regulate by investigation.

3. *The Minor Real Issues*

The Court of Appeals based its sound decision on t foregoing grounds. However, other adequate groun for affirming its action are clearly apparent in the reco

a. There was no evidence in the Record sufficient to support the trial court's rulings in regard to pertinency; and relevant evidence as to pertinency proffered by respondent was erroneously excluded.

b. The subpoenas issued by the Buchanan Committee were invalid in that they were not induced by any evidence, were not supported by oath or affirmation and did not allege that the information sought as to the names of the purchasers of books was pertinent to the inquiry.

c. The trial court erroneously charged the jury in respect to the meaning of "willful" in the statute involved.

ARGUMENT

I The False Issue

The Government's Argument is Based Upon a Case Which The Prosecutor Refused to Have Tried and Upon Evidence Not in the Record.

Although the respondent Rumley was formally found guilty by a jury, all the controversial issues raised in his defense were held by the trial judge to be issues of law; and all of them were then decided by the judge against the defendant's contentions. The District Court held and instructed the jury that the House Committee had been given authority to investigate "lobbying activities" and that it was pertinent to its authorized investigation to require the C.C.G. as a publisher to reveal the names and addresses of all purchasers of his books. The *only* evidence presented to the trial judge and considered by him, in support of his ruling that the testimony demanded and refused was pertinent to the Committee's inquiry, was evidence the C.C.G. and Rumely had registered under protest as lobbyists.

We quote from the Record, Page 43:

"THE COURT: Frankly, if you are going to address yourself to that particular thing I can't im-

agine anything more pertinent in connection with lobbying than asking the names and dollars and cents contributed; because that is what makes the wheels spin, it seems to me."

Immediately following the above remark the prosecutor stated: "We have offered all of our pertinency testimony," and stated, "We are prepared to rest now." Counsel then proceeded at once to arguments in support of (and in opposition to) defendant's motion for a directed verdict of acquittal, which the Court denied. (R. 68)

Thus, it is clear beyond dispute that there was no evidence presented to and considered by the trial judge in the support of the contention which is *now* made by the government on appeal, but was *not* made in the trial court: that payments made to the C.C.G. for the purchase of books were actually subterfuges to disguise contributions to lobbying.

The reason why the government did not make this contention in the trial court was because it could be easily refuted. The C.C.G. did not engage in any lobbying, unless "lobbying" were defined to include the publication of books and documents which, because of their influence upon public opinion, might have an indirect influence upon the passage or defeat of legislation. The Government brief in this Court concedes that the C.C.G. "rarely, if ever, engaged in direct representations to Congress". (Brief Page 30) Therefore, any contributions for the support of the C.C.G. *could* only be used by it—and *were* only used—to cover losses occasioned by the free distribution of printed material, or because of sales to purchasers at prices below cost.

If the prosecutor in the trial court had attempted to introduce evidence that payments for books were subterfuge contributions, his contention and his evidence would have bounced back in his face because then the door would have been open to testimony by Rumely as to what the activities of the C.C.G. really were, and open to

the production of financial records to prove that all the money received by the C.C.G. for payments of books, or from conceded contributions, were all expended in carrying on the activity of publishing books and other printed material for the purpose of influencing public opinion in favor of political and economic policies and programs approved by the trustees of this non-profit organization.[2]

The prosecutor in the trial court quite obviously adopted the strategy of relying upon two legal contentions: First, that "lobbying activities" which the House Committee was authorized to investigate were intended to cover, and constitutionally could be construed to cover, any enterprise publishing books which supported or opposed political policies or programs. Second, that since the C.C.G. and Rumely had registered as lobbyists that registration constituted conclusive proof that their activities were subject to investigation by the House Committee. (See Opinion by Court of Appeals, R. 200)

The prosecutor managed to convince the trial judge that he had made out not only a prima facie case, but one which the defendant Rumely should not be permitted to controvert *because, upon objections by the prosecutor, the trial judge would not permit Rumely to testify as to what the activities of himself and his organization were, or what their financial records showed.* The trial judge would not even permit defendant Rumely to introduce copies of the publications of the C.C.G. despite the fact that the government prosecutor had read into the Record some of the testimony taken by the House Committee regarding these same C.C.G. publications! (R. 41-42)

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[2] The material from the House Committee (the Report, quoted by the dissenting judge in the Court of Appeals), itself demonstrated that the alleged "subterfuge" contributions were used to pay for the distribution of books and other printed documents. The majority opinion quoted Rumely's explicit disavowal: "I am not employed to support or oppose any legislation whatsoever". (R. 196)

policies and programs, and inevitably exercising and intended to exercise an influence to "encourage, promote or retard legislation." If the Congress had attempted to enact a law regulating, restricting and embarrassing *such* freedom of the press there would have been a roar of opposition from every section of the country and every organization of citizens desirous of influencing or shaping public opinion.

There must be some intelligible meaning given to the use of the word "lobbying" in the resolution creating and authorizing the investigations of the Committee. The obvious limitation is that stated by the Court of Appeals when it held that "Congress was certainly aware of the common meaning of the words lobbying activities when it used them in conferring authority upon the Buchanan Committee. At the most, the words depict no more than representations made directly to the Congress, its members, or its committees." (R. 204)

If, as the Court of Appeals pointed out, the House Resolution was intended to "encompass the full scope of the Regulation of Lobbying Act," then the validity of the resolution is made dubious for the very reasons which induced a three-judge statutory court to declare unanimously that Sections 303 to 307 of the Lobbying Act are unconstitutional. (R. 205) Hence the Court of Appeals, following well-established law, undertook to give a *valid* construction, if possible, to the House Resolution and held that it authorized investigation of only "lobbying in its commonly accepted sense, and did not purport to convey power to investigate efforts to influence public opinion." From this construction of the Resolution the Court concluded that the demand made upon Rumely for the names of purchasers of books was "outside the terms of the authority of the Buchanan

Committee, since the public sale of books and documents is not 'lobbying.'" (R. 205)

We are printing as an appendix to this brief a complete copy of the opinion of the three-judge statutory court holding that Sections 303 to 307 of the Lobbying Act are unconstitutional, because this opinion also demonstrates why the House Resolution here involved *would be invalid*, if construed to authorize an investigation of (as a "lobbying activity") the publishing and sale of books intended to influence public opinion.

The Solicitor General concedes that "general legislation compelling disclosure of the names of C.C.G.'s larger purchasers would probably be voided, or Congress forbidden to compel by continuous inquiry a regular, repeated disclosure of names." (G. Brief 77-78). But, he contends that, nevertheless, the Select Committee could validly make an "*ad hoc* demand for disclosure" of this same information, disclosure of which could not be compelled by "general legislation." We would point out, first, that the contention that Congress, through an investigating committee, can compel a disclosure of information which could not be compelled by statute, is an outrageous effort to justify doing an unlawful act indirectly, which the Congress is specifically forbidden to do directly.

Second, in authorizing a committee investigation of a subject matter as vague as "lobbying activities," the House Resolution was subject to the same charge of invalidity which the three-judge statutory court sustained against the Lobbying Act. The statutory court held, on the basis of a long line of decisions in this court, that a criminal statute "must define the crime with sufficient precision and formulate an ascertainable standard of guilt, in order that any person may be able to determine whether any action or failure to act is prohibited."

Then the statutory court held that the phrase, "to influence directly or indirectly the passage or defeat of any legislation by the Congress" was "manifestly too indefinite and vague to constitute an ascertainable standard of guilt." (App. P. 64)

The Lobbying Act was interpreted as a criminal statute because anyone who violated its provisions would become subject to criminal penalties.

The House Resolution, taken in combination with the statute under which respondent Rumely was prosecuted for contempt, must be construed like a criminal statute. The House Resolution authorized the committee to conduct an investigation of "all lobbying activities intended to influence, encourage, promote or retard legislation." If "lobbying activities" was intended to cover an infinite variety of activities (including even the publication of books intended to influence public opinion), how could a witness refuse to answer any question, or to produce any document, on the ground that it was not "pertinent" to such an illitimable investigation?

But, under the law (2 U.S.C. 192) if a witness made default, or refused "to answer any question pertinent to the question under inquiry" he would become guilty of a *crime*. How could a witness, even with the aid of legal counsel, determine when his refusal would be justified, or when it would constitute a crime? There could be no "ascertainable standard of guilt" found, in attempting to decide whether a question was pertinent to an inquiry into "lobbying activities," when no one could tell what was meant by "lobbying activities" and what, therefore, a court might eventually decide was pertinent to an inquiry into "lobbying activities."

We submit, therefore, that, if the House Resolution be construed to "encompass the full scope of the Regula-

tion of Lobbying Act," it must be held invalid for the reasons pointed out by the Court of Appeals. The Resolution can only be held valid if it be held to authorize only an inquiry into "lobbying activities" in their "commonly accepted sense." If this necessary limitation is imposed on the authority of the House Committee, then it is clear that the demand upon Rumely was to produce evidence not pertinent to the limited inquiry authorized. Hence, he could not be convicted of a contempt in refusing to respond to this illegal demand.

B. An Act of Congress Which Compelled Publishers to Disclose the Names and Addresses of Purchasers of Their Books Would Clearly Violate the Freedom of the Press Guaranteed by the First Amendment.

But, the Government contends that the Resolution did authorize an inquiry into the public sale of books and documents on the ground that the sale of books and documents intended to influence public opinion—and thereby to influence "indirectly" legislation—was a "lobbying activity." In support of this contention the Solicitor General first raises the false issue that payment for books was only a subterfuge for making contributions to a "lobbying" organization. Recognizing, however, that this Court may well hold with the Court of Appeals that this is an attempt to sustain a conviction on "issues not presented in the trial court, and facts not in evidence in the Record," (R. 209) the Government brief ventures upon the argument that the House could authorize an inquiry into the "public sale of books and documents" intended to influence public opinion, as a form of "lobbying" subject to Congressional regulation. Here the Government challenges the soundness of the law long ago

——When, however, it became apparent to the government, *upon oral argument* in the Court of Appeals that the conviction of Rumely could not be sustained on the evidence presented to and considered by the trial court, in view of the improper rulings and instructions of the trial court, then, although the government brief in the Court of Appeals had not raised the question,[3] the government counsel in the oral argument attempted for the first time to make the "subterfuge" contention which was adopted by the dissenting judge and then made the basis for the petition and brief in this Court.

This claim that payments for books were subterfuge contributions is not based on any evidence in the record of this case. Indeed, the Solicitor General is compelled to concede the fact that he is asking this Court to sustain the rulings of the trial judge on the assumption that evidence which was *not* presented and *not* considered by the trial judge *might* have been considered by him and (if not controverted) might have supported his rulings.

The Solicitor General admits that the report of the House Committee was not introduced into evidence, although the dissenting judge in the Court of Appeals mistakenly said it was "made a part of the Record." (R. 214) The dissenting judge also used the transcript of the House Committee hearings to support his views, as does the Solicitor General in his brief. But only a few fragments of that transcript were introduced in the trial record. The dissenting judge said that judicial notice could be taken of Congressional hearings. But, to take judicial notice at a time when there is an opportunity to dispute the accuracy of what is noticed is quite different from an attempt to have an appellate court take judicial notice of testimony in a Congressional hearing to sustain a con-

[3] "No mention of a purpose to probe disguised contributions appears in the Government's brief before us." (R. 200)

viction of a defendant who has had no opportunity to refute the testimony. Furthermore, it is one thing to take judicial notice of facts of common knowledge, but the idea that testimony taken at a Congressional hearing can be incorporated into the Record in the Court of Appeals by "judicial notice", is a novel and extraordinary perversion of "due process of law".

> "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence * * * It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ohio Bell Tel. Co.* v. *Comm'n* 301 U.S. 292, 301-2.

Rule 804 American Law Institute Model Code of Evidence and the comments recognize that a court's ruling on a matter of judicial notice will necessarily influence counsel in the further conduct of the trial. See also *United States* v. *Bryan* 339 U.S. 323 in which both the majority and minority opinion deal with the legal difficulties of even placing the testimony before a House Committee into the record in the type of criminal trial here involved.

The only authority referred to by the government in support of its broad sweeping conclusion that the Court can take judicial notice of committee hearings and reports is *United States* v. *Aluminum Company of America* 148 F(2) 416 (G.Brief P.49). In that case the Court recognized and followed the fundamental principles of judicial notice which we are urging here when it stated:

> "Even though we took 'notice' of these, the report would not be conclusive, or more than evidence. We could not constitutionally substitute it for the findings of a Court after a trial: facts which a Court may judicially 'notice' do not for that reason become indisputable. Wigmore §2567a. At most we could

> do no more than treat the report as newly discovered evidence, and send the issue back for another trial, which in the present case we should under no circumstances be willing to do. For these reasons we refuse to take 'notice' of facts relevant to the correctness of the findings; but we do take 'notice' of those relevant to remedies." (P. 446)

But, the excuse for this violation of elementary principles of due process is that the report of the House Committee and the transcript of the House hearings were "actually before the trial judge". (Petitioner's Brief. Page 48) This we flatly deny on the ground that no evidence is "before" a judge unless it is made a part of the record of the case. Government counsel say, "There is nothing to show that it was not considered by the trial judge"; to which we answer, there is nothing to show that it *was* considered. Again, the Solicitor General states, "There is nothing to show that the trial judge did *not* consider the hearings in passing upon pertinency"; to which we reply first, that there is nothing to show that the trial judge *did* consider the hearings, and, second, that the transcript of the record in the trial court which is part of the record here (R. 14-181) shows plainly that the trial court did *not* consider either the Committee Report or the Committee hearings in making his rulings and, third, that, if he had considered them and had given any consideration to the subterfuge contention made by the government for the first time on the appeal of this case, the trial judge would have been compelled to admit the evidence proffered to show what the activities of C.C.G. and Rumely actually were and what the financial records revealed.

In truth, the trial judge instructed the jury that, "The nature of the activities of the defendant or of the organization with which he was connected is not an issue in this case." (R. 176) If there had been any contention that

payments for books were subterfuges to obtain contributions to carry on "lobbying activities" then, of course, the activities of the defendant would have been a major issue in the case. The ruling of the Court would be nonsensical except on the basis made evident by the judge's earlier commentary which showed that he assumed that the registration (*even under protest*) as a lobbyist was conclusive proof that the House Committee had jurisdiction to compel Rumely to reveal the names and addresses of any purchasers of books, because such evidence, even of a wholly legitimate and candid transaction, would be pertinent to the Committee's inquiry.

That is why we insist that the present "subterfuge" contention of the government is an attempt to raise a false issue, an attempt to sustain a conviction resulting from rulings which, on the Record before the Court, were hopelessly erroneous. It would make a mockery of the boasted fairness of our administration of justice for this Court to hold that the conviction of a defendant which cannot be sustained on the evidence *on which he was tried,* can be sustained by the consideration in this Court of evidence not presented in the trial court, on one-sided evidence highly prejudicial to the defendant, whose falsity, unfairness and deceitfulness the convicted defendant had no opportunity to expose. He is now helpless to combat this foul play except by the assertions of his counsel that if Rumely had had an opportunity to testify to the activities and the records of his organization, he could have demonstrated thoroughly, first, that they were not engaged in any lobbying activities which the Committee had been authorized to investigate and, second, that, for that reason as well as because of the protection of a free press established by the First Amendment the evidence sought by the Committee was not pertinent to any lawful inquiry by the Committee.

The following quotations from opinions of this Court seem hardly necessary but are submitted to show the absurdity of the government's position.

> "After all, pleadings and the making of a proper record have not been dispensed with. We will not review questions not clearly raised on the record." *Standard Oil Company* vs. *United States* 339 U.S. 157.
>
> "The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record, made up and transmitted as required by law, of what was done in his presence at the trial in open court." *Hopt* vs. *Utah* 114 U.S. 488.
>
> "Besides judgment can not be reversed upon the mere suggestion that upon some other theory than that upon which the case was tried evidence might have been introduced which might have changed the result." *Thomas* vs. *Taylor* 224 U.S. 73.
>
> "We can not sustain a conviction for the acts submitted on the theory that, even if insufficient, some unsubmitted ones may be resorted to as proof of treason." *Cramer* vs. *United States,* 325 U.S. 1.

We submit that the government is seeking to have tried in the Supreme Court a case which was not tried, but which, on the contrary, the government refused to have tried in the trial court. The brief is a confession that the conviction of the respondent cannot possibly be sustained on the issues and evidence actually submitted to the trial jury. This is clearly demonstrated by the opinion of the Circuit Court of Appeals. Thus the government is apparently driven to a contention that the conviction should be sustained because the defendant *might* have been convicted if other issues and other evidence had been submitted to the jury. This contention must be as unique in the annals of this Court as it is affronting to elementary concepts of justice and fair play.

II The Dominating Real Issues

The Well Settled Law Regarding Constitutional Limitations on the Legislative Powers of the Congress and the Rights of the Respondent Under the Bill of Rights Require Affirmance of the Action of the Circuit Court.

There were three issues raised by respondent Rumely in justification of his refusal to reveal the names and addresses of purchasers of books published by the C.C.G.

1. Rumely contended that the House by its Resolution had not empowered the Committee to make such inquiries.

2. If the Resolution were construed to authorize such inquiries the House had exceeded its constitutional power by thus attempting to abridge freedom of speech and freedom of the press in violation of the First Amendment.

3. The subpoenas issued by the House Committee were invalid under the Fourth Amendment because they were not founded on any evidence of the materiality of the papers demanded or supported by oath or affirmation, and the information sought and refused was not pertinent to the inquiry and so the demand for its production violated the rights of the defendant under not only the First, but also the Fifth and Ninth Amendments (This third issue was not pressed with the same vigor as the first two issues because the respondent Rumely had voluntarily furnished the Committee or given access to all the records sought, with the exception of records showing the names and addresses of purchasers of books, and he wished to make it clear that he was not opposing an investigation by the Committee even of a dragnet character, but was primarily interested in maintaining the constitu-

tional freedom of the press. The conviction of Rumely on Count 7 of the indictment did not involve the Fourth Amendment, but was based on a refusal to give oral evidence when he appeared as a witness as to the name of "the woman from Toledo", who had paid $2,000 for distribution of copies of "The Road Ahead", which she purchased for distribution to a specified list of recipients.)

The protections of the Fourth Amendment should be maintained in order to protect the objects of political hostility from being harrassed by "fishing expeditions" into their private affairs, from which they are supposed to be protected by the prohibition in the Fourth Amendment of "unreasonable searches and seizures" and the requirement that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Furthermore, the demand for the information here sought and refused is repugnant to the guaranty of liberty contained in the Fifth Amendment and, not only the guaranties of freedom written into the First Amendment, but also repugnant to the rights retained by the people in the Ninth Amendment, which certainly include rights of privacy, except when the public interest imperatively demands that they be disregarded.

A. Congress Did Not Attempt to Authorize the Buchanan Committee to Investigate Efforts to Influence Public Opinion in Regard to Federal Legislation.

The House Resolution authorized the Select Committee "to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote or retard legislation." It must be assumed that the phrase "lobbying activities" was not intended to include those manifold activities of book, magazine or newspaper publishers, which are clearly intended to influence, encourage, promote or retard legislation. There must have

been a limitation implied in the very use of the word "lobbying" whereby many activities, intended to influence, encourage, promote or retard legislation, would be excluded.

But, the construction now urged by the government makes the use of the word "lobbying" superfluous and meaningless since apparently any activity to influence legislation is regarded by government counsel as a "lobbying" activity. The opinion of the Court of Appeals makes this point clear (R. 203, 204) and points out the historic reason for describing certain efforts to influence legislation as "lobbying", that is activities carried on in the "lobbies" outside legislative chambers. Of course, personal solicitation of legislators in their homes or offices, or on the streets, would come within the same category of "lobbying". In like manner, making personal appeals to legislators through letters, telegrams, or telephone calls in regard to specific legislation might easily be regarded as a form of "lobbying". In a word, any form of personal approach to a legislator for the purpose of influencing his conduct in regard to a specific piece of legislation might come within the term "lobbying".

However, there would be no doubt that printing editorials in a newspaper regarding specific legislative proposals would be an activity definitely intended to influence legislation. But the Lobbying Act itself specifically eliminated from its coverage not only editorials, news items and other comments, but also "paid advertisements which directly or indirectly urged the passage or defeat of legislation." Surely, if any one had thought it necessary the Act would also have eliminated from "lobbying" the publication of books or magazines advocating or opposing legislation. It could not have been the intent of the Congress to stigmatize as "lobbying activities" the publication of books or magazines strongly urging political

laid down in *Kilbourn v. Thompson,* 103 U.S. 168, and ever since then upheld in the opinions and decisions of this court.

The Investigatory Power

The opinion of the Supreme Court in *McGrain* v. *Daugherty,* 273 U. S. 135, lays down the major principles of law decisive of the present case. The court held, quoting with approval from *Kilbourn* v. *Thompson,* 103 U. S. 168, that—

> "The principles announced and applied in the case are that neither House of Congress possesses a 'general power of making inquiry into the private affairs of the citizen'; that the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it rightfully may take other action;" (P. 170)
>
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>
> "While these cases (referring to *Kilbourn* v. *Thompson,* supra, *In re Chapman,* 166 U. S. 661 and *Marshall* v. *Gordon,* 243 U. S. 521) are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied. The latter proposition has further support in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, 417-419, and *Federal Trade Commission* v.

American Tobacco Company, 264 U. S. 298, 305-306." (P. 173-174)

In answer to a contention that investigative power may be abused, the court further held:

> "We must assume, for present purposes that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief. And it is a necessary deduction from the decision in *Kilbourn* v. *Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the *bounds of the power are exceeded* or the questions are not pertinent to the matter under inquiry." (P. 175-176)

Later in the opinion it was held:

> "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object." (P. 178)

Applying these principles to the present case we submit that if "lobbying activities" were to be the subject matter of legislation they could only be such illegitimate or wrongful attempts to influence legislators as the Congress could constitutionally legislate against. If "lobbying activities" be interpreted to include the legitimate efforts of citizens to influence legislators or legislation by speaking, printing and disseminating economic, social, moral or political opinions so as to influence public opinion—and the opinions of legislators—the Congress would have 'no jurisdiction' to enact laws restricting such constitutionally protected freedoms of speech, press, assembly and petition. The Congress is specifically for-

hidden by the First Amendment to abridge such freedoms and thus violate the fundamental rights of a free people.

In the present case the court must either presume (a) that such invalid legislation was *not* the object of the House in ordering an investigation of lobbying (and hence the records and testimony sought were not pertinent to the inquiry authorized), or (b) that, if such invalid legislation *was* the object of the investigation authorized, then the entire investigation was unlawful and not ordered "to aid it in legislating." Then the investigation would be a deliberately lawless attempt to "inquire into private affairs and compel disclosures" of private opinions and activities beyond the scope of the constitutionally limited legislative power.

It does appear from the sweeping terms and vague coverage of the Lobbying Act that the Congress may have not recognized that it could not legislate to restrict First Amendment freedoms under its power to legislate to restrict illegitimate and wrongful efforts to influence legislators or legislation. The inquiries attempted by the Buchanan Committee certainly show an utter failure to recognize this limitation upon Congressional power. But a court called upon to enforce compulsory disclosure of matters obviously beyond the scope of legislative regulation, must choose between either confining the definition of "lobbying activities" to activities subject to legislative regulation, or else find that the Lobbying Act and the Buchanan Committee investigation were unconstitutional attempts to exercise a power specifically denied to the Congress in the Bill of Rights.

The Limitations of the First Amendment

We should not impose on this court any lengthy dissertation on the rights protected against legislative re-

straint by the First Amendment to the Constitution. But since the government's argument is based upon a desire to plainly violate these rights we are under an obligation to assert them vigorously. A few quotations from opinions of the Supreme Court should be more effe tive than any original argument.

In *Thomas* v. *Collins*, 323 U. S. 516, the court held:

"The case confronts us again with the duty our system places on this court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. *Cf. Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Prince* v. *Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when

this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *DeJonge* v. *Oregon,* 299 U. S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759-760." (P. 529, 530)

In *Lovell* v. *Griffin,* 303 U. S. 444, the court held that book publishers are included in the freedoms protected by the Constitution when it stated:

"The liberty of the press is not confined to newspapers and periodicals * * * The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near* v. *Minnesota,* supra; *Grosjean* v. *American Press Co.,* supra; *DeJonge* v. *Oregon,* supra." (P. 452)

As was stated by the court in *Grosjean* vs. *American Press Co.* 297 U.S. 233, 249:

"The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

In *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, the opinion of the Court stated principles, as to which we can assume there was and will be no dissent, in holding:

"The right of a State to regulate, for example, a public utility may well include, so far as the due

process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But *freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.*" (P. 639) (Italics ours)

The invalidity of any attempt by the Congress to regulate the publication, distribution and purchase of concededly lawful printed material is so plain that an investigation by a committee "in aid of (such) legislating" cannot possibly be held to be a valid exercise of congressional power.

Justification of the inquiries directed at the respondent and the C. C. G. is attempted by the government on the theory that to require (1) registration by a publisher of any printed material that might "influence directly or indirectly the passage or defeat of any legislation", and to require (2) a public report and accounting for his receipts and expenditures, and (3) a report of the names and addresses of any persons paying him more than $500, are not "restrictions" upon the freedom of the press.

But such a theory is transparently unsound. The Supreme Court has held:

> "The power to impose a license tax on the exercise of these freedoms (protected by the First Amendment) is indeed as potent as the power of censorship which this Court has repeatedly struck down." *Murdock* v. *Pennsylvania*, 319 U. S. 105

The registration and reporting required in the Lobbying Act—if applied to publishers—is a peculiarly onerous form of licensing. The obviously large cost of compliance is as burdensome as a heavy license tax. The restraints upon publication are not only severe but are actually a form of censorship, prohibiting certain types

of legitimate publication except upon conditions which compel the publisher to register as a "lobbyist" and which deter persons from buying his books because of public criticism that they are supporting "lobbying". The inquiries of the Buchanan Committee were of the character that would undoubtedly injure a publisher's business and scare away his prospective customers. No court can be respectfully asked to ignore these realities. Blind justice may be tolerable but not blind judges. "We may not shut our eyes to any facts of common knowledge". *Louisville Trust Co.* v. *Louisville N. A. & C. R. Co.*, 174 U. S. 674, 683. "To do this would be to shut our eyes to what all others see and understand". *United States* v. *Butler*, 297 U. S. 1, 61.

The "lady from Toledo" purchased 4000 copies of *The Road Ahead* to be sent to persons in her home town whose social, economic, moral or political opinions she thought it might influence. Surely she had a constitutional freedom to do this. But, if she had known that her name and address must be reported to Congress and would be sensationally publicized by a committee of Congress she might well have been deterred from making such a purchase.

Even more obvious would be the legislative restraint on large employers to deter them from buying the book published by the C. C. G. entitled *Why the Taft-Hartley Law?* Many an employer, seeking to counteract the notorious propaganda of all major labor organizations against this Act, and to enlighten public opinion as to its merits, would be normally inclined to purchase quantities of these books for distribution. But the enforced publicity of such purchases under the Lobbying Act and the Buchanan Committee investigation would inevitably deter many such employers from thus arousing antagonisms that would surely embarrass their efforts to maintain cordial relations with their employees and union organizations.

As this Court stated in *Thomas* v. *Collins,* (Supra):

> "The restraint is not small when it is considered what was restrained. * * * If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty." (P. 543)

The *Readers Digest,* a magazine of several million circulation, published a condensation of *The Road Ahead,* large quantities of which were sold as a separate pamphlet to many quantity purchasers. Because of the special exemption of newspaper and periodical publishers in the Lobbying Act the *Readers Digest* was not required to register and to report on these sales. Nor could the *Readers Digest* publishers be compelled to give such information to the Buchanan Committee. But the prosecution contends that the C. C. G. was required to register and report *their* sales and to answer the inquiries of the Buchanan Committee regarding these sales and the purchasers.

It would be difficult enough to uphold the validity of this Act of Congress if it arbitrarily required book publishers to register and report as "lobbyists" while it exempted newspapers and magazines from the same requirement, since it is well known that newspapers and magazines are much more actively and continuously engaged in influencing public opinion than book publishers. But the arbitrary burden and restriction upon book publishers becomes positively ludicrous when it is pointed out that the book publisher of *The Road Ahead* is made subject to legislative restraints that are not imposed on the newspaper or magazine publisher of a condensation of the same book!

It is clear that, either the exemption of publishers of newspapers and periodicals was an arbitrary favor

extended to these publishers, which would invalidate any restraints intended to be imposed on book publishers; or the Congress never intended (nor even imagined) that book publishers would be held subject to the law or to investigation by a committee authorized to investigate "lobbying activities".

If, in the alternative, the Congress has acted on the assumption that *all* publishers of any printed material which may "influence directly or indirectly, the passage or defeat of any legislation by the Congress of the United States" *can* be required to register, report receipts and expenditures, and reveal the names and addresses of purchasers of their publications, then it is imperative that the invalidity of such an excessive exercise of legislative power, in violation of the First Amendment, be speedily made plain by the judiciary. If book publishers can be harassed and muzzled today the entire newspaper and periodical press can be regulated and browbeaten tomorrow on the same theory of legislative power.

It is hard to imagine any method, short of direct censorship and forceful suppression of hostile criticism, by which a national administration could more effectively hamper and embarrass any political opposition to its policies and programs. If "lobbying activities", subject to legislative regulation are held to include any and all publications which may "influence, directly or indirectly" legislation, where is the limit to legislative abridgement of the freedom of the press? Even if criticisms and opposing opinions cannot be directly censored and suppressed, what more effective way could be found to restrain them than to subject critics and opponents to the harassment and burdens of—

1. "registering" as persons engaged in a dubious activity,
2. requiring them to make expensive, detailed reports,

3. dragging them before investigating committees to testify as to their wholly legitimate but essentially private affairs,
4. compelling the disclosure of the opinions and the names and addresses of those who support their activities in order that they in turn may be attacked, harassed and injured by persons who disagree with their ideas and thus may be effectually discouraged from voicing or propagating their opinions?

We see a parallel line of devious reasoning employed today in Czechoslovakia and other communist ruled countries. "Espionage" is universally regarded as properly subject to investigation and punishment by government. So, to abridge freedom of the press, a communist government simply includes the ordinary search of newsmen for news as "espionage" and the publication of news as "subversive attacks" upon the government. By this device even a foreign newspaper reporter, solely engaged in legitimate work, can be tried and convicted of heinous crimes.

The passage of the Lobbying Act and the investigation of the Buchanan Committee follow *exactly the same pattern.* The legitimate publishing and distribution of printed material is stigmatized as "lobbying". Burdensome obligations of reporting, accounting and disclosing private affairs are imposed. Harassing, costly and defamatory investigations are used to injure a legitimate business; and any resistance to improper demands brings a government prosecution and *a jail sentence.*

How absurd for our national officials and the press of our nation to rail at Communist prosecutions—and the imprisonment of an Associated Press reporter in Czechoslovakia—while our own government follows the same pattern of censorship and persecution in using "lobbying" instead of "espionage" as the cloak with which to cover a venemous attack upon freedom of speech and a free press.

Two quotations from a recent opinion of the Supreme Court are most pertinent:

> "The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that 'It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.' (Mr. Justice Jackson, concurring in *Thomas* v. *Collins*, 323 U. S. 516, 547 (1945).)" *American Communications Association, C. I. O.* v. *Douds*, 339 U. S. 382, 399.

In the above case (which involved the non-communist oath required by the Taft-Hartley Act) the Court answered the contention that the statute was an attempted exercise of "thought control", as follows:

> "The answer to the implication that if this statute is upheld 'then the power of government over beliefs is as unlimited as its power over conduct and the way is open *to force disclosure of attitudes on all manner of social, economic, moral and political issues*', post. p. 438, is that that result does not follow 'while this Court sits' (*Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223 (1928)." (Italics ours) *American Communications Association* v. *Douds*, supra, P. 410.

We feel confident that "while this Court sits", it will hold that any legislative restraint upon freedom of the press by attempts "to force disclosure of attitudes" (of purchasers or distributors of legitimate publications) "on all manner of social, economic, moral and political

issues", is an invalid abridgement of the freedom of the press protected by the First Amendment.

The First, Fifth and Ninth Amendments

In addition to an abridgement of freedom of the press, which we have discussed at some length, consideration should be given to violation of other constitutional rights which would inevitably follow upon sustaining the construction by the Buchanan Committee of the Lobbying Act and of its own investigatory power, which is offered as the sole legal justification for compelling production of the records and testimony which were refused by defendant.

Free public discussion of public issues by speaking, publishing and distributing opinions as to desirable or undesirable legislation or by assembling and petitioning the government for redress of grievances cannot be constitutionally abridged, hampered and discouraged by defining all efforts to influence the passage or defeat of legislation as "lobbying" and by then forbidding "lobbying" except by persons who register and make a detailed accounting for all receipts and expenditures in aid of "lobbying", so defined, and who report the names of all "contributors". By such legislative action not only freedom of the press is abridged, but also the cognate precious freedom of speech and the right to assemble and petition for redress of grievances.

Effective exercises of freedom of speech, and of the right to assemble and petition, in such a manner as to have any appreciable effect upon public opinion and upon legislation inevitably require, in this nation of 150,000,000 people, the expenditure of money in substantial amounts and the employment of paid agents to do a great deal of detailed, time consuming work. A large mass meeting cannot be arranged, an impressive petition cannot be prepared, halls cannot be rented, adequate

publicity cannot be secured, in support of social, economic, moral or political opinions without organizing for collective action and without collecting and expending considerable sums of money. According to the construction of the Lobbying Act upon which this prosecution is grounded, every such exercise of First Amendment freedoms by volunteer committees, non-profit associations or permanent organizations (such as, for example, the Women's Christian Temperance Union, the American Bar Association or the Federal Council of Churches) would be subject to legislative restraint by compelling compliance with the Lobbying Act and subjecting all persons involved to such investigations as that conducted by the Buchanan Committee.

It is a matter of common knowledge that federal departments and bureaus prepare and distribute at public expense an enormous amount of "educational" material, which is intended to influence directly or indirectly public opinion and legislation.[4] Members of Congress themselves have printed and distributed at public expense articles, speeches and reports for the same purposes. To avoid the dangers of such political indoctrination the utmost freedom of private organization and action to educate and influence public opinion is essential to make government "responsive to the will of the people" (*DeJonge* v. *Oregon*, 299 U. S. 353) and to prevent opposition to the party in power from being overwhelmed by a flood of government propaganda. Hence any attempted legislative restraint on private opinion-making

[4] "The Federal Government now employs about 5000 full and part-time press agents, spends an estimated $65 million a year on salaries and printing. . . . In addition nearly every high Administration official has a press relation adviser who masquerades as a 'special assistant', feeds the press a constant flow of 'don't-quote-me' background information or 'leaks' calculated to prove that 1) the official is wonderful, 2) his opponents are not to be trusted and 3) all is well in Government." *Time*, July 9, 1951, p. 54.

efforts should be regarded as *prima facie* an abuse of legislative power.

It must be recognized that political campaigns for the election of public officials are subject to certain legislative regulations which have an entirely different justification from that offered for the regulation of "lobbying". The expenditure of money and other contributions to promote the election of a public official may have a direct *and improper* influence upon his conduct in office—as has been unfortunately proven too often in our political history. There may be a reasonable limitation upon the amount of money which should be so contributed or expended. There is an *intended* restraint upon *undue* or *improper* influence, in giving publicity to the names of large contributors. These are not restraints upon freedom of speech or press, but on the use of *improper money influence* upon *individuals,* which might be limited or discouraged by publicity. And here legislative restraint is exercised to remedy a substantive evil and menace to free elections, and representative government, which has been generally recognized as an evil.

But the restraint of expenditures made to propagate opinions on public issues is an entirely different thing. Here the evil to be avoided is not too much, but too little private activity; not the spread but the suppression of private opinion; and not efforts to influence legislation but public inertia and inattention to the discussion of public issues. Here is an area wherein the utmost freedom from governmental restraint is essential to the perpetuation of popular government and the maintenance of individual liberty. This has been recognized and accepted as a foundation principle of our form of government ever since the Constitution and Bill of Rights were adopted. See the unanimous opinion of the court in *DeJonge* v. *Oregon* (Infra).

This "freedom of political discussion" is protected not only by the First Amendment. It is part of the "liberty"

protected in the Fifth Amendment. It is one of the rights retained by the people in the Ninth Amendment. It is most likely that the invasion of these rights and freedoms will come from the Executive Department. That has occurred all too often. But an executive officer usually acts upon the basis of some authority apparently granted to him by the legislature. The greatest menace of a violation of these rights and freedoms lies always in a legislative Act—the making of a law to restrict the exercise of constitutional liberty. It is most significant that the First Amendment does not read: "No person shall be deprived of", but reads *"Congress shall make no law"*. The mandate of the people was directed at the legislative authority, explicitly denying to it any power to abridge essential liberties. The people retained in full their right to criticise their government and their public officials, their freedom to express and to propagate their opinions and to call upon their public representatives to respond to these opinions.

The most inexcusable and arrogant defiance of the fundamental sovereignty of "the people" would be for the Congress to interfere in any way with their efforts by every means of legitimate persuasion to induce *their* representatives to act in accordance with *their* opinions. This was surely a right retained in the Ninth Amendment; and the means of its exercise were protected explicitly by the First Amendment.

Personal solicitation may go beyond reasonable bounds and become attempted bribery or coercion. Against such wrongful activities the members of Congress may rightly seek to protect themselves. But they should move most cautiously and with greatest deference to the individual liberties and private rights of citizens when they seek such self-protection. When we observe

the extent to which legislators are openly subjected to inducements of favor by patronage and promotion, and to threats of political reprisal and personal loss and injury, we must realize that any legislative restraint upon exercises of political influence must be very carefully limited to clearly illegal or improper conduct and must avoid very carefully any legislative restraint upon the fundamental freedom of the citizen to express and propagate his political opinions and to influence legitimately the opinions and actions of his representatives.

In the present case, however, instead of a cautious exercise of a dangerous power, the Congress proceeded with legislation and investigation of a most reckless and sweeping character. Only a fearsome regard for the self-protective powers of newspaper and magazine publishers evidently dictated the exclusion of these most influential molders of public opinion from the harassment of the Lobbying Act and the investigations of the Buchanan Committee.

But a majority of the Committee had no regard for the constitutional rights and freedoms of those supporting or carrying on the work of the C. C. G. The defendant and the C. C. G. were denounced as "lobbyists" because they dared to publish books and pamphlets that might create a public opinion in opposition to the legislative program of the party in power. So, by a strictly partisan majority vote, the Committee, over the objections of the minority, proceeded not only to serve and enforce a dragnet subpoena of records, but, after nothing else had been withheld from them, insisted on trying to compel the defendant to reveal the names and addresses of quantity purchasers of books—for what purpose? Simply to embarrass and injure the publisher of books and his customers by smearing them with publicity to create the impression that they were engaging in some sort of dubious activity, derogatorily classed as "lobbying"—a word of evil import.

C. Reply To Government Argument

The argument of the government is based on the apparent assumption that an era of regulation and terroriaztion by legislative investigation has arrived and that the doctrines of the Bill of Rights should be scrapped as undue restraints.

What is the answer of the Solicitor General to the foregoing argument?

1. The Government Brief first endeavors to convince the Court that old-fashioned lobbying by "direct buttonholing of legislators" has been succeeded by an "organized influencing of public opinion"—(Brief p. 13), by "indirect activities" for the "artificial creation of public opinion." What this "double talk" really means is instead of appealing directly and personally to individual legislators, opponents or advocates of legislation are trying to create a public opinion which will influence legislators to respond to the informed opinions of their enlightened constituents. It means that legislators, who might have a personal or partisan bias in favor of the demands of self-serving blocks of voters (seeking, for example, subsidies or other political favors), may be compelled by an informed electorate to follow a genuine "public opinion" and legislate in behalf of broader public interests.

As the Court of Appeals well held, such a "pressure of public opinion in the Congress" is "not an evil; it is a good, the healthy essence of the democratic process." (R. 203) Of course, as the Court of Appeals noted, "an evil might arise." "But," said the Court, "the case before us concerns the public distribution of books and the formation of public opinion through the process of information and persuasion. There is no evil or danger in that process."

To this judicial wisdom we would add that there is an enormous evil and danger in the abridgement of free speech and freedom of the press. The First Amendment

was enacted to prevent the Congress from imposing on the people the evil and danger of legislation to stifle free speech and to throttle a free press. The great decisions of the Supreme Court protecting the people from that evil and danger are still the law; and we do not believe that the sophistries of the Government argument will persuade this Court to overthrow those barriers to legislative attempts to suppress and control the formulation of an informed public opinion.

2. The Government Brief next asserts the Congressional power to investigate is not subject to Constitutional restraints on the power of Congress to legislate. We submit that the contrary holdings of this Court previously quoted (supra p. 28-33, 38) are still the law; and we feel sure they will remain the law. How farcical it would be to hold that, although Congress has been denied any power to enact a law to compel a publisher to disclose the names and addresses of those who buy his books, a mere Committee of either House of Congress, can exercise that power under guise of an "investigation to aid it in legislating."

3. The Government Brief then argues that compelling disclosures of private affairs is not a violation of the constitutional freedom of the press, because this "imposes no *legal* sanctions of any kind on the expression of ideas by anyone." (Italics *theirs*. G. Brief p. 19) But, in the next breath, Government counsel concede this may be "an actual 'restraint,' but it is not an abridgement of First Amendment rights."

In other words it is argued that a "restraint" of free speech or a free press is not an "abridgement" unless there is a legal penalty imposed upon speaking or writing. We submit that that is "double-talk" on a par with the claim that a people are "liberated" when they are subjected to a new form of tyranny. The authors of the First Amendment might well arise from their honored graves to protest against such a distortion of

the guaranties of freedom which they wrote into the Constitution.

4. Finally, the Government Brief argues that if the "restraints" imposed by forced disclosures are *legal* restraints and *would* violate the First Amendment, the House Committee's "*ad hoc* demand for disclosure would be valid"—because the Committee has power (unlimited apparently) to force disclosures in an "investigation" which it could not force by enacting a law. (G. Brief p. 21 and 77) Thus the Solicitor General casually sets aside the long line of opinions stemming from *Kilbourn* v. *Thompson*, supra. In making this argument the government's brief confesses the utter futility of its other arguments by stating that legislation compelling the disclosure of the names sought in the inquiry would probably be void:

> "But we also believe that the committee's *ad hoc* demand in the course of inquiry must be upheld even though *general legislation compelling disclosures of the names of CCG's larger purchasers would probably be void or Congress forbidden to compel by continuous inquiry a regular repeated disclosure of names.*" (G. Brief P. 77-78)

Without contra point by point and case by case citations we submit that the entire argument of the Government's Brief is fortified—not by any authoritative precedents—but only by the apparent assumption that a new day of regulation and terrorization by legislative investigations has arrived, and that the old-fashioned language and doctrines of the Bill of Rights should be supplanted by a modernized construction under which Committees of the Congress can (to quote the language of Justice Holmes) "sweep all our traditions into the fire." (*Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 299, 305)

If this Court seeks guidance into this new day it can presumably be found in the "Partial Bibliography" of extra-judicial writings provided in Appendix B of the

Government Brief. We submit, however, that better guidance in the "new order" which was established by the Constitution in 1787 will be found in the landmark opinions of this Court heretofore cited and quoted in this brief in behalf of the respondent.

III The Minor Real Issues

The Conviction Should Have Been Reversed Because of Other Obvious Errors of the Trial Court Which the Court of Appeals Found It Unnecessary to Consider.

Other and independently adequate grounds compelling the reversal of the conviction of the respondent were presented to the Circuit Court of Appeals but were not decided simply because the main constitutional issue provided a sufficient basis for setting aside the verdict. In this connection the Court of Appeals stated:

> "Appellant (respondent Rumely) raises other questions respecting the rulings of the trial judge during the course of the trial. We find it unnecessary to consider them." (R. 210)

We also urge that it should be unnecessary for the Supreme Court to pass upon these matters. However, if this Court should disagree so completely with our position and that of the Court of Appeals as to hold that the inquiries directed to respondent Rumely could be constitutionally enforced, then the additional adequate grounds for affirming the Circuit Court's action must be considered.

It is well established that questions apparent on the record are reviewed by this Court where necessary. *Public Service Commission Havemeyer* 296 U.S. 506. Additional grounds apparent in the record will be considered even though rejected by the Court below. *Helvering* vs. *Lerner Stores Company* 314 U.S. 463. *Langness* vs. *Green* 282 U.S. 531. *Stelos Company* vs. *Hosiery Motor-*

Mend Corp. 25 U.S. 235. *Story Parchment Company* vs. *Patterson Parchment Paper Company* 282 U.S. 555.

In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *S.E.C.* vs. *Chenery Corp.* 318 U.S. 80; *Helvering* v. *Gowran* 302 U.S. 238; *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208; *United States* v. *American Ry. Express Co.*, 265 U. S. 425; *United States* v. *Holt State Bank*, 270 U.S. 49, 56.

The additional errors of the Trial Court which are clearly apparent in the record, each of which presents valid grounds for affirming the action of the Court of Appeals, are discussed briefly in this section for consideration if such a review should become necessary.

A. The Record Is Barren of Any Evidence to Support the Trial Court's Rulings in Regard to Pertinency.

The prosecution in a criminal case has the burden of not only pleading but proving all the essential elements of the crime charged. The government in this case had the burden of proving, as the most essential element of the crime charged, that the information requested was pertinent to the Buchanan Committee inquiry. In the case of *Sinclair* v. *United States*, 279 U. S. 263, this Court restated this basic rule of law in the following language:

> "Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation." (P. 296)

In addition it is well established that insufficiency of the evidence requires reversal of a conviction where the case (as here) is one involving deprivation of constitutional safeguards of the accused. *Cramer* vs. *United States* (supra).

We have heretofore pointed out that there is no evidence in the present record to support the conclusion of the trial judge that the respondent or the C. C. G. was engaged in any activity that would subject them to any lawful requirements of the Lobbying Act of investigation by the Buchanan Committee. The question may naturally arise as to why the prosecutor did not attempt to prove by some sort of evidence what the activities of respondent and the C. C. G. actually *were*, and why the prosecutor objected to all evidence offered by the respondent to prove what these activities actually were. This strange reticence suggests only one explanation. The prosecutor must have known that the respondent and the C. C. G. could prove that none of their activities could be subjected to lawful restraint or included within any definition of "lobbying" justifying either regulation or investigation. Any opening of the door by the presentation of any affirmative evidence by the prosecution witnesses would have opened the door to overwhelming negative evidence in behalf of the respondent. So the door was held shut by the prosecutor; and then it was locked by the trial judge against evidence that might have enlightened him as to what the activities of the respondent and the C. C. G. actually were. As a result there is no evidence in the record on which the trial judge could have legally based his rulings.

Even the majority of the Buchanan Committee in its General Interim Report to Congress admits that the nature of the books which were excluded by the trial

judge when offered by respondent are essential to a determination of the question of relevancy.

> "The content of the publications concerned is, of course, important in determining whether or not the distributor may lawfully be required to disclose his source of support—either before this committee or pursuant to the Lobbying Act." (81st Congress, 2nd Session, House Report No. 3138, p. 32)

We, as counsel for the respondent cannot incorporate in our brief evidence which was excluded except to the extent of showing that material evidence which was proferred was excluded. Certainly the Government cannot properly incorporate in its brief any alleged evidence that the prosecutor *might* have offered to support a conviction which can not be sustained on the basis of the evidence which was *actually received* and considered. Accordingly we maintain that there was no conflict of evidence weighed and decided by the court (since the only evidence received was the respondent's *denial* of "lobbying activities") and that the crucial conclusion of the trial judge, that, as a matter of law, registration *under protest* for "lobbying activities" was *proof* of "lobbying activities", and his consequent instructions to the jury, failure to grant a judgment of acquittal, and denial of respondent's motion for a new trial constituted indisputable, reversible errors.

An express denial of a fact cannot be taken as an admission or proof of its existence. *Clarendon* v. *Weston*, 16 Vt. 332. In tax cases a payment under protest is not an admission or proof of liability but, as stated by the court in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 173: "A protest is for the purpose of inviting attention of the taxing authorities to the illegality of the collection * * *". See also *Fulton Bag & Cotton Mills* v. *United States*, 57 F. (2) 914.

B. Fourth Amendment

The protection of the Fourth Amendment of the Constituution against searches and seizures reaches all individuals alike, whether accused of a crime or not. The power given to Congress to investigate matters within the realm of its legislative authority does not carry with it the authority to destroy or impair the fundamental rights that are recognized by the Constitution as inhering in the freedom of the citizen.

This Court in *Interstate Commerce Commission* v. *Brinson*, 154 U. S. 447, quoted with approval the following statement of Mr. Justice Field *In re Pacific Railway Commission*, 32 Fed. Rep. 241:

> "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value." (P. 479)

The Fourth Amendment protected the respondent from the operation of the subpoenas requesting the names and addresses of the purchasers of books because the subpoenas were not issued upon proper cause, not supported by oath or affirmation, and contained no pretense or claim that the names of purchasers of books were pertinent to the inquiry concerning lobbying activities.

A government's "fishing expedition" into the papers of a private corporation on the possibility that they may disclose evidence of a crime even when instituted under oath is not permitted under the Constitution. As Justice Holmes stated in the unanimous opinion in *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 299:

"Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * * and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." (p. 305-306)

* * * * *

"The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. * * * Some ground must be shown for supposing that the documents called for do contain it. * * * A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced." (P. 306)

* * * *

"The investigations and complaints seem to have been only on hearsay or suspicion—but, even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law." (P. 307)

The subpoenas issued by the Buchanan Committee were not induced by any evidence, were not supported by oath or affirmation and did not allege that the information sought as to the names and addresses of the purchasers of books was pertinent to the inquiry. The subpoenas are invalid under the Fourth Amendment for these reasons and also because, as shown in previous sections of this brief, the information sought is, in fact, not pertinent to the inquiry and falls within the prohibitions of the First, Fifth and Ninth Amendments of the Constitution.

The trial court was obviously in error in not entering a judgment of acquittal on the two counts of the indictment based upon respondent's default under these subpoenas.

C. The Trial Court Erroneously Charged the Jury in Respect to the Meaning of "Wilful" in the Statute Involved.

The Act upon which the indictment of the respondent was based (set out above in full) declared that every person summoned before either House of Congress to give testimony or to produce papers who "wilfully makes default, or who having appeared refused to answer any question pertinent to the question under inquiry" is guilty of a misdemeanor.

As set forth by this Court in the case of *Murdock* v. *United States*, 290 U. S. 389

> "Two distinct offenses are described in the disjunctive, and in only one of them is wilfulness an element. • • • The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded." (P. 397)

In this same case the Court held the word "wilful", as used in criminal statutes such as the portion of the statute here dealing with default in producing subpoenaed papers, to mean bad purpose or evil motive and stated:

> "• • • when used in a criminal statute it (wilfully) generally means an act done with a bad purpose • • •. The word is also employed to characterize a thing done without ground for believing it is lawful • • • or conduct marked by careless disregard whether or not one has the right so to act. • • • It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. • • • The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill-founded as to exhibit bad faith and establish

wilful wrongdoing. This was the effect of the instructions given. We think the Circuit Court of Appeals correctly upheld the respondent's right to have the question of absence of evil motive submitted to the jury, and we are of opinion that the requested instruction was apt for the purpose." (P. 394-396)

The respondent Rumely requested the trial court to instruct the jury in regard to "wilful" in the exact language as was requested in the *Murdock* case as follows: "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful." (R. 5, 167)

The trial court in this case actually instructed the jury in regard to all three counts that:

"Wilful as used in Title II, Section 192, of the U. S. Code, means deliberate and intentional, and not inadvertent or accidental. Thus the motive of the defendant in failing to comply with the subpoena, and his reason for such failure, or his reason for refusing to answer any question, are not material so long as you find that he did so intentionally and deliberately. The word 'wilful' does not mean that the failure or refusal to comply with the committee's order or refusal to answer a question must necessarily have been for an evil or a bad purpose. The reason or purpose of the failure to comply or refusal to comply is immaterial, whether it is done in good faith or bad faith, so long as the refusal is deliberate and intentional and is not a mere advertence or an accident.

"Even if a person believes that he has a legal right to refuse to produce documents, or to refuse to answer questions, if that belief is erroneous this circumstance would be immaterial, for one decides at his own peril what his legal duties are.

"You are further instructed that the fact that the defendant may have acted pursuant to advice of his

attorney, or others, would not be justification for his refusal to comply with the subpoenas or his refusal to answer." (R. 177)

The ruling of the trial court that the reasons for appellant's refusal to produce the documents requested were immaterial and the trial court's instructions to the jury on wilfulness are clearly reversible error under the express rulings of this Court in *Murdock* v. *United States*, (supra) the principles[5] of which were reaffirmed and followed in *Morissette* v. *United States*, 342 U.S. 246. See also *Townsend* v. *United States*, 95 F(2) 352, Cert. Denied 303 U.S. 664. This is particularly true in view of the fact that the appellant did not "wilfully" but, in good faith and upon the opinion and advice of competent counsel, refused to give the names of the book purchasers demanded, as he told the committee only because he was convinced that it would be a violation of the Bill of Rights and of his constitutional rights as a publisher.

CONCLUSION

This case originated in a serious abuse of legislative power, in an inquisition prosecuted by a House Committee in arrogant violation of the constitutional limitations upon legislative power.

This case proceeded through a travesty upon a fair trial, in which elementary rights of a defendant to introduce evidence in his behalf were disregarded, and incompetent and insufficient evidence introduced by the government was given unworthy weight. All vital issues were held to be, and decided by the judge as, issues of law; even the issue of wilfulness, that is of a criminal

[5] "However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury." *Morissette* vs. *United States*, 342 U.S. 246, P. 274.

intent, was decided *for* the jury *by* the trial judge, who would not permit the jury to hear any evidence of the good faith with which a citizen was willing to risk his liberty in order to maintain his constitutional rights. Under the instructions of the trial judge, based on improper rulings of evidence and disregard for the constitutional decisions of the Supreme Court, the jury was left no choice except to return a verdict of guilty.

This case reaches its final conclusion in an appeal by Government lawyers to the highest judicial tribunal in the land to disregard, not only constitutional limitations upon legislative power, but also long-established and constitutional limitations upon judicial power. An appeal is made to this Court to sustain a criminal conviction on the basis of alleged evidence which was never received by the trial court, on the basis of evidence which, if received, would have been refuted.

In short, this Court is asked to disregard the fundamental principles of due process of law and to sustain a criminal conviction on the basis of charges made against the defendant for the first time in this Court—charges as to which no evidence was heard in the trial court, charges based on the assertions of the Solicitor General, supported by the equally unreliable assertions of a partisan majority of a legislative committee.

This is plainly an effort to sustain a criminal conviction without giving the convicted man any notice or opportunity to be heard upon the charges made—without any hearing on these charges by the jury which is supposed to have convicted him. This extraordinary method of presenting this case in this Court has carried the impact of the anticipated decision beyond even the question as to whether the First Amendment is to be de-

fended and supported as a constitutional limitation upon *legislative* power. The decision of this case will also determine whether the mandate of the Fifth Amendment, that no person shall be deprived of liberty without due process of law, is to be defended and supported as a constitutional limitation upon *judicial* power.

There is only one explanation of the ruthless prosecution of this case against the respondent Rumely, beginning with a partisan political inquisition in a House Committee and proceeding through a politically biased trial in the District Court to its fitting conclusion in a politically biased appeal to this Court. That explanation is the ever growing intolerance of criticism, characteristic of those entrenched in political power and their ever growing desire to suppress the opposition of citizens who exercise the essential liberties of a free people—those freedoms of speech and of the press which are guaranteed by our Constitution to protect our people against the oppressions of Government.

There is no lesser issue in this case; there can be no greater issue submitted to this Court than: The destruction or preservation of those freedoms upon which depends not only the majesty of this Court, but the very life of the Government and of the Constitution which this Court is sworn to defend.

In *DeJonge v. Oregon*, 299 U.S. 353, the unanimous opinion of this Court by Chief Justice Hughes pointed out the "imperative need"—"to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." And, he

concluded—as we do: "Therein lies the security of the Republic, the very foundation of constitutional government."

Respectfully submitted,

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APPENDIX

Opinion of United States District Court for the District of Columbia in National Association of Manufacturers vs. J. Howard McGrath, March 17, 1952.

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103 F. Sup. 510.

(Appeal Dismissed Supreme Court No. 174, October 13, 1952

Rehearing Denied November 18, 1952)

Before Wilbur K. Miller, Circuit Judge; Henry A. Schweinhaut and Alexander Holtzoff, District Judges.

Holtzoff, District Judge: This action is brought by the National Association of Manufacturers of the United States and one of its officers against the Attorney General of the United States, to enjoin him from instituting prosecutions against them for violations of the Federal Regulation of Lobbying Act (Act of August 2, 1946, secs. 302-311, 60 Stat. 839; 2 U.S.C.A. secs. 261-270). The basis of the action is twofold: first, that the Act is unconstitutional; and, second, that even if valid, it is not applicable to the plaintiffs.

The Act may be divided into two parts: First, all persons, except political committees, who directly or indirectly solicit, collect, or receive money to be used prin-

cipally to aid, or whose principal purpose is to aid in the passage or defeat of any legislation by the Congress of the United States; or to influence, directly or indirectly, the passage or defeat of legislation by the Congress of the United States, are required to keep a detailed and exact account of contributions and expenditures with receipted bills, and to file with the Clerk of the House of Representatives quarterly statements listing contributions and expenditures (Secs. 303-307).

The second part of the Act requires persons who engage for pay, or for any consideration, to attempt to influence the passage or defeat of legislation by the Congress of the United States, to register with the Clerk of the House of Representatives and with the Secretary of the Senate, and to file certain quarterly reports (Sec. 308). These two parts of the Act are severable. The second is not involved in this action.

It is a general principle that equity will not enjoin prosecuting officers of the Government from instituting or maintaining criminal prosecutions.[1] Any defense that a person has to a criminal prosecution may be asserted at the trial of the criminal case and will not be adjudicated in advance by a court of equity. For this reason, the Court will not consider the contention that on the factual situation presented by the evidence, consisting of lengthy depositions and voluminous exhibits, the plaintiff Association is not subject to the terms of the statute. This is a defense that must be passed upon, in a criminal proceeding, if a prosecution is instituted.

On the other hand, an exception to the general principle is at times made if it is contended that the statute is unconstitutional and the consequences of a violation

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[1] *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95. *Cave* v. *Rudolph*, 53 App. D. C. 12, 15.

may be unusually serious, possibly resulting in irreparable damage.[2] For example, in this case if the statute is valid and the Association erroneously determines that it is not subject to its provisions, it may be liable to a penalty, not only of a fine, but of a proscription for a period of three years from attempting to influence directly or indirectly the passage or defeat of any proposed legislation by the Congress. The Court is of the opinion that this case is within the exception insofar as concerns the contention that the pertinent provisions of the statute are unconstitutional. Accordingly the Court will in this action pass upon the validity of these provisions.

The Government has raised the question whether the plaintiffs are in a position to maintain this action on the ground that no prosecution has, as yet, been threatened. A great deal of testimony has been taken on this issue. The Court finds that such a prosecution has, in fact, been threatened, even though the threat has not been made formally.

The vital provision of the pertinent portions of the statute (Sec. 307) makes its requirements applicable to any person who, by himself or through any agent or employee, or other persons, in any manner whatsoever, directly or indirectly, solicits, collects, or receives money to be used principally to aid, or whose principal purpose is to aid, in the passage or defeat of any legislation by the Congress, or to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of

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[2] *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, 209 U. S. 123, 163 *et seq.*; *Truax* v. *Raich*, 239 U. S. 33, 37-39; *Adams* v. *Tanner*, 244 U. S. 590; *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Packard* v. *Banton*, 264 U. S. 140, 143; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451-2; *Parker* v. *Brown*, 317 U. S. 341, 349-350; *Hynes* v. *Grimes Parking Co.*, 337 U. S. 86, 98-100.

the United States. It is a well established principle that a criminal statute must define the crime with sufficient precision and formulate an ascertainable standard of guilt, in order that any person may be able to determine whether any action, or failure to act, is prohibited. A criminal statute which does not comply with this principle is repugnant to the due process clause and is, therefore, invalid. This is a fundamental principle in our constitutional system, since without it, it would be possible to punish a person for some action or failure to act not defined in the criminal law and which that person had no way of knowing was forbidden.

For example, in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221, the Court passed upon the validity of a Kentucky statute, which made certain combinations for the purpose of controlling prices lawful, unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. The Court held that the statute offered no standard of conduct and was, therefore, invalid.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89, the Court held unconstitutional an Act of Congress, which made it unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. This result was reached on the ground that no definite standard of conduct was prescribed by the statute.

In *Connally* v. *General Const. Co.*, 269 U. S. 385, 391, the Court considered an Oklahoma statute, which provided that all persons employed by or on behalf of the State shall be paid not less than the current rate of per diem wages in the locality where the work is performed. It was held that this statute was repugnant to the due process clause of the Fourteenth Amendment on the ground that the phrase "current rate of wages" and the

word "locality" were indefinite and ambiguous. The Court summarized the pertinent principles as follows:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 456, the Court struck down a State statute, which declared all combinations to be against public policy, unlawful and void, except those whose object and purpose was to conduct operations at a reasonable profit or to market at a reasonable profit those products which otherwise could not be so marketed. The Court reached the conclusion that this statute involved so many factors of varying effect that one could not decide in advance whether any proposed action on his part would violate it.

In *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242, the Court held invalid a statute, which prohibited production of crude oil in such manner and under such conditions as to constitute waste. The Court referred to the fact that the general expressions employed were not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty.

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, the Court had before it a New Jersey statute to the effect that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more per-

sons, is declared to be a gangster. The Court held that the words "gang" and "gangster", and the phrase, "known to be a member", were ambiguous and so vague, indefinite, and uncertain as to render the statute repugnant to the due process clause of the Fourteenth Amendment.

In *Winters* v. *New York*, 333 U. S. 507, a New York statute which punished any one who published, sold, distributed or showed, or had in his possession, with intent to sell, distribute or show, any printed paper principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust, or crime, was deemed not to meet the required standards and not to contain ascertainable standards of guilt. The Court concluded that the statute was violative of the due process clause of the Fourteenth Amendment.

The Court of Appeals for the District of Columbia in *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, passed upon a statute imposing penalties on any street railway company in the District of Columbia, that failed to supply and operate a sufficient number of cars, to all persons desirous of the use of said cars, "without crowding said cars". The Court held that the statute was unconstitutional, as the phrase "without crowding" was too uncertain and indefinite to constitute an ascertainable standard of guilt. It pointed out that the dividing line between what is lawful and unlawful may not be left to conjecture.

Applying the foregoing doctrine to the instant case, the conclusion is inescapable that Sections 303 to 307 are invalid. The clause, "to influence, directly or indirectly, the passage or defeat of any legislation by the Congress" is manifestly too indefinite and vague to constitute an ascertainable standard of guilt. What is meant by influencing the passage or defeat of legislation indi-

rectly? It may be communication with Committees or Members of the Congress; it may be to cause other persons to communicate with Committees or Members of the Congress; it may be to influence public opinion by literature, speeches, advertisements, or other means in respect to matters that might eventually be affected by legislation; it may be to influence others to help formulate public opinion. It may cover any one of a multitude of undefined activities. No one can foretell how far the meaning of this phrase may be carried. No one can determine in advance what activities are comprehended within its scope.

The statement found in a prior clause of Section 307 to the effect that its provisions apply to certain persons whose principal purpose is to aid in the accomplishment of the enumerated objectives, is likewise subject to the same criticism.

What is meant by "principal purpose"? Is the term "principal" used as distinguished from "incidental"? May a person have a number of principal purposes? Or is the term used as meaning the "chief" purpose of a person's activities? When does a purpose become principal and when does it cease to be such? The Act contains no definition of that term.

We conclude that Sections 303 to 307, inclusive, are invalid as contravening the due process clause of the Fifth Amendment in failing to define the offense with sufficient precision and to set forth an ascertainable standard of guilt.

Section 310 of the Act, which relates to penalties, subjects any person who violates the provisions of the Act to a fine of not more than $5,000, or imprisonment for not more than twelve months, or both. In addition, subsection (b) of Section 310, provides that any person so convicted shall be prohibited for a period of three years from attempting to influence, directly or indirectly, the

passage or defeat of any proposed legislation, or from appearing before a Committee of Congress in support of or opposition to proposed legislation. Violations of this prohibition are made felonies punishable by imprisonment for not more than five years or a fine of $10,000.

Freedom of speech and the right of the people peaceably to assemble and to petition the Government for redress of grievances are guaranteed by the First Amendment to the Constitution. Congress is prohibited from making any law abridging these rights. The penalty provision of the Act, however, manifestly deprives a person convicted of violating the statute, of his constitutional right of freedom of speech and his constitutional right to petition the legislative branch of the Government. This clause is obviously unconstitutional. A person convicted of a crime may not for that reason be stripped of his constitutional privileges. In principle this provision is no different than would be an enactment depriving a person of the right of counsel, or the right of trial by jury, for a period of three years after conviction. It is inconceivable that anyone would argue in support of the validity of such a provision, and yet, in principle, the penalty clause in this statute is no different. We, therefore, reach the further conclusion that Sections 303 to 307, inclusive, of the statute are unconstitutional in that the penalty attached to their violation is invalid and contravenes the First Amendment to the Constitution.

Accordingly, we hold that Sections 303 to 307, inclusive, of the Act are unconstitutional. We regard Section 308 as severable and we, therefore, do not express any opinion as to its validity, because that question is not involved in this litigation.

A permanent injunction against the prosecution of the plaintiffs for violations of any provision of Sections 303 to 307, inclusive, is granted.